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IN THE

Supreme Court of the United States

October Term, 1959

No. 798

LEE WAN NAM a/k/a HONG LEE,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OCTOBER TERM, 1959

No. .....

LEE WAN NAM a/k/a HONG LEE, *Petitioner,*

AGAINST

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associated Justices of the Supreme Court of the United States.

A. The Opinion Below

The United States Court of Appeals for the Second Circuit has affirmed the conviction of the petitioner, after a trial by jury in the United States District Court for the Southern District of New York, of violating 21 U. S. C. Sections 173 and 174. The opinion of the United States of Appeals is set forth in Appendix A and is not yet officially reported.

B. Grounds Upon Which Jurisdiction of This Court Is Invoked

The United States District Court for the Southern District of New York obtained jurisdiction because the crimes charged, violations of Federal laws, were committed within the Southern District of New York. The specific statutes involved are Title 21 U. S. C. Sections 173 and 174.

The jurisdiction of this Court is resorted to pursuant to Rule 19 of the Supreme Court Rules and Title 28, U. S. C. Section 1254 (1). Review by the United States Supreme Court by writ of certiorari is sought on a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

Certiorari is further requested because there is involved a serious and novel constitutional question, concerning both Amendments IV and V of the United States Constitution. A definitive ruling would be of immeasurable aid and importance to the lower Federal courts in deciding future cases.

The United States Court of Appeals for the Second Circuit stayed its mandate pending a final determination by this Court.

C. Questions Presented

1. Was it not serious error to receive the half kilogram of heroin in evidence after it had been ordered suppressed as against a co-defendant? Having once been suppressed was it not tainted with criminality with respect to all and for all time and did it not do violence to Amendments IV and V of the United States Constitution?

2. Was it not prejudicial error to permit the prosecution to reopen its case in chief during its rebuttal phase of

the case and allow it to present in evidence one-half kilogram of heroin solely against the petitioner after this evidence had been suppressed as against a co-defendant?

3. Was it not reversible error to deny an application for a mental examination of the Government's main witness, Tom Tung, to determine whether or not he possessed the mental capacity to give competent testimony?

D. Constitutional Provisions and Statutes Involved

The Constitutional provisions and statutes involved are:

1. The Fourth Amendment of the United States Constitution.
2. The Fifth Amendment of the United States Constitution.
3. Title 21, U. S. C. Sections 173 and 174.
4. Rule 41(E) of the Federal Rules of Criminal Procedure.

E. Statement of Facts

A three count indictment, containing two substantive allegations and one count of conspiracy, charged three defendants, the petitioner, Sheck Hom and May Moy with violations of the Federal narcotics laws.

The first count alleged that the petitioner and Sheck Hom knowingly concealed, received, sold and facilitated the transportation and the concealment of 11 grains of heroin, knowing the same to have been illegally imported into the United States.

The second count alleged a similar charge against May Moy. However the amount of heroin involved was 17 ounces and 337 grains.

The third count charged all three defendants with a conspiracy to violate the Federal narcotics statutes.

Tom Tung, a special employee of the Government had importuned his nephew, the defendant Sheck Hom to arrange a rendezvous with the petitioner. The ostensible purpose of the meeting was the purchase of narcotics by Milton Wu, an agent of the Bureau of Narcotics.

A meeting of the parties was had in Hom's automobile in New York City's Chinatown and Wu offered to purchase a half kilogram of heroin for $6,000. However, he desired a sample to determine if the quality of the narcotic warranted the high purchase price.

The petitioner left the vehicle and met with May Moy. This meeting had been observed by other Federal agents. Lee Wan Nam returned to the car and it is charged that he gave Wu a glassine envelope containing 11 grains of heroin. Sheck Hom and the petitioner were then arrested and were taken to the vicinity of the Moy residence.

The petitioner disclosed that the Moy apartment contained a quantity of heroin. Federal agents broke into this apartment and, after searching it, found a half kilogram of heroin. This was the prosecution's case.

At the completion of the Government's case May Moy was acquitted on motion for a directed judgment of acquittal. Sheck Hom was acquitted after verdict and the petitioner was convicted on the first count and acquitted with respect to the conspiracy charge.

The petitioner relies on substantial errors made by the Trial Court during the course of trial. It is asserted that the lower court adopted a most unusual procedure which seriously precluded a fair trial. In permitting the prosecution to reopen its case in chief during its rebuttal phase, it damaged the petitioner beyond legal repair. The sup-

pressed and tainted half kilogram of heroin was admitted over timely objection against the petitioner. This huge quantity of heroin operated to bolster a weak case and provided a dramatic finish to an otherwise pedestrian prosecution. Initially this narcotic had been excluded on the theory that it would impair and damage May Moy. However, with her departure, this impediment ceased to exist. Nonetheless, the prosecutor failed to move to reopen his case immediately after the Moy departure.

The denial of the application for a mental examination of Tom Tung was improper within the framework of this case and within the orbit of a narcotics prosecution.

The admission into evidence of the tainted heroin, suppressed as to May Moy was gross error. Evidence, once suppressed remains so for all time and inures to the benefit of all.

F. Arguments in Support of Petition

1. The suppressed evidence should not have been received. Having once been suppressed, it was tainted with the stain of criminality with respect to all and for all time. Its introduction did violence to Amendments IV and V of the United States Constitution, as does Rule 41(E) of the Federal Rules of Criminal Procedure.

May Moy had succeeded, under the rule, in having the half kilogram of heroin suppressed. The petitioner categorically asserts that evidence, illegally obtained and once suppressed, remains so for all time and inures to the benefit of all. If Rule 41(E) operates as a bar to this contention then it must be deemed violative of Amendments IV and V of the United States Constitution and declared so.

To adopt any other position would be to sanction criminal activity on the Government's part. In *Sorrells* v. *United States*, 287 U. S. 435, 457, Mr. Justice Roberts said:

> "The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law."

In *Sherman* v. *United States*, 356 U. S. 369, 372, the Court held that

> "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime."

In *Olmstead* v. *United States*, 277 U. S. 438, 470 (dissenting) Mr. Justice Holmes warned that

> "It is desirable that criminals should be detected, and to that end that all available evidence should be used. It is also desirable that the government not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained."

Again in *McNabb* v. *United States*, 318 U. S. 332, 341 repeated the admonition and the law:

> "The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those tried solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal jus-

> tice in the federal Courts, see Nardone v. United States, 308 U. S. 338, 341-42, this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions * * * and in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance."

Justice and constitutional prohibitions exert a force that irresistibly compels the reversal of this conviction. A positive finding has been made that the Government has been guilty of criminal conduct in violating the sanctity of the Moy home. The Government has been rewarded—it has convicted the petitioner. To justify its criminal conduct, the Government asserts that the petitioner cannot be heard to complain as he could not have asserted any rights under Rule 41(E) of the Rules of Federal Criminal Procedure. The Government casts a stone though it is not without sin. The absurdity of its position is pointed out in "Judicial Control of Illegal Search and Seizure", 58 Yale L. J. 144 (1948):

> "The illogic of limiting the exclusionary protection to the aggrieved party appears in a pattern of inequitable decisions where for example a conspiracy exists in which one member of a gang owns the property used by all, the owner, frequently the master criminal may go free, while his helpers are punished."

The highest Court of the State of California has concurred with this position:

> "* * * the rule of the lower federal courts is based on the theory that the evidence is excluded to provide a remedy for a wrong done and accord-

> ingly, if the defendant has not been wronged he is entitled to no remedy. *People* v. *Martin*, 45 Cal. 2d; 290 P. 2d 855."

It emphasized that this Court expressed a more logical more legal and civilized belief and

> "• • • has clearly recognized that the purpose of the exclusionary rule is not to provide redress or punishment for a past wrong, but to deter lawless enforcement of the law"

See also:

> *Walden* v. *United States*, 347 U. S. 62; 64-65;
> *United States* v. *Mitchell*, 322 U. S. 65, 70-71.

In *Walden*, this Court made most clear its attitude regarding the reprehensible activities of Federal agents:

> "The Government cannot violate the Fourth Amendment—in the only way that the Government can do anything, namely through its agents—and use the fruits of such unlawful conduct to secure a conviction."

> "All these methods are outlawed and convictions obtained by means of them are invalidated, because they encourage the kind of society that is obnoxious to free men."

For an exhaustive study of the question see *Grant*; "Circumventing the Fourth Amendment", 14 So. Cal. L. Rev. 359 (1941); "Evidence—Search and Seizure", Michigan L. Rev., Vol. 55, pp. 568-581 (1957); University of Pennsylvania Law Review, Vol. 97, pp. 728-729 (1949).

The problem is then exposed in stark reality. Evidence concededly obtained through criminal conduct by Federal

agents is suppressed as to one but admitted against another who does not achieve the protection of Rule 41(E). Constitutional prohibitions are violated. Concepts of justice betrayed but a fiction is maintained in order that the convenience of the Government may be served in the procurement of criminal convictions.

As late as 1942 this Court has "never been called upon to decide the point." *Goldstein* v. *United States*, 316 U. S. 114, 121; 62 S. Ct. 1000, 1004; 86 L. Ed. 1312. However in *McDonald* v. *United States*, 335 U. S. 451 (1948), it indicated its intention to reverse any and all criminal convictions obtained as a result of evidence illegally obtained.

McDonald and Washington have been indicted in the District of Columbia for violating the lottery laws. Certain evidence, of a highly probative nature, had been possessed as a result of an illegal search and seizure occurring in McDonald's apartment where he and Washington had been engaging in the illegal activity. Washington had no standing under Rule 41(E) and could not move to suppress the evidence. However, McDonald did and his motion was denied. This Court in reversing the convictions as to both held:

> "It follows from what we have said that McDonald's motion for the suppression of evidence and the return of the property should have been granted. *Weeks* v. *United States* (supra); *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 358. It was, however, denied and the unlawfully seized evidence was used not only against McDonald but against Washington as well, the two being tried jointly. * * * Even though we assume, without deciding, that Washington, who was a guest of McDonald, had no right of privacy that was broken when the officers searched

> McDonald's room without a warrant, we think that the denial of McDonald's motion was error that was prejudicial to Washington as well. In this case, unlike *Agnello* v. *United States* (supra, p. 36), the unlawfully seized materials were the basis of the evidence used against the co-defendant. If the property had been returned to McDonald, it would not have been available for use at the trial. We can only speculate as to whether other evidence which might have been used against Washington would have been equally probative."

This concept expressed in *McDonald* is entirely consistent with the view of Mr. Justice Holmes in *Silverthorne* v. *United States*, 251 U. S. 385, 392:

> "The essence of the provision forbidding the acquisition of evidence in a certain way is that not merely evidence acquired shall not be used before the Court but that it should not be used at all."

See also:

> *United States* v. *Kidd*, 153 F. 2d 605;
> *Nelson* v. *United States*, 208 F. 2d 505 (C. C. A., D. C.), cert. denied, 74 S. Ct. 48.

The opinion of the Court of Appeals recognizes that question is most difficult. This is evidenced by the length of time it required to decide the point and also by its unsuccessful effort to reconcile its opinion with that of *McDonald*. It admitted that the Supreme Court had never been called upon to decide the precise point.

The opinion of the Court of Appeals fails to appreciate the import of the *McDonald* case. It grounded its affirmance on the picayune particle that the evidence in *McDonald* was subject to return, and, if returned, would not be

available. The instant case, it said, concerns heroin, contraband, that could not be restored to May Moy. Therefore because it could not be returned to the owner it could be used against the petitioner. Illegal activity thus is sanctioned on a flimsy and vaporous technicality. Illegal behavior is sanctioned because of the character of the material seized. Form supplants substance and the petitioner is deprived of his liberty. This Court has never blessed the unlawful behavior of Government agents. It has never permitted the rape of the Constitution of the United States on the basis of convenience of prosecution. The crime of the Government's agents in effecting the illegal search and seizure in the instant case should not be rewarded and should once and for all times be effectively penalized. Evidence once suppressed must remain forever suppressed as to any and all.

The United States Constitution would cease to have meaning if the Federal Government is to be permitted to profit by its illegal acts and crimes. The Fourth Amendment, already reduced to the status of a ridgeling by the enactment of Sections 7607 and 7608 of Title 26 U. S. C., would be completely emasculated and reduced to the status of a constitutional eunuch by such an application of Rule 41 (E).

Likewise, the Fifth Amendment, already in public disfavor by reason of the dissemination of false information by the press and self annointed "reformers", will be rendered more impotent if such illegal searches and seizures were to receive the accolade of this Court.

The Supreme Court of the United States must, in unmistakeable language, make clear to Government Agents that the Federal Government can not profit by their engagement in criminal activity. The ends do not justify the means regardless of the nobility of the expressed motive.

2. A most prejudicial procedure has been sanctioned. To permit the prosecution to reopen its case in chief during the rebuttal phase is to do violence to the petitioner's rights. This technique allows the prosecution to fortify a weak case and to enable it to close with great dramatic impact.

Few criminal accusations inflame the passions, loose the furies and dull the edge of reason, than those which charge a violation of the narcotics statutes. The drug indictment contains its own internal dynamics that create inflammatory tensions. Heroin, a prosecutor's delight, is anathema, dooming, with rare exceptions, those accused to certain conviction and long confinement. This intolerable situation, slow in developing, exists. The media of communications have conditioned an eager and uncritical public. The public, like Pavlov's dog, reacts to the stimulus of "heroin" with the response of "conviction".

The narcotics charge demands that the Judiciary conduct itself with greater care and more sensitive alertness during the course of the proceeding. The slightest error in this type of matter inevitably enhances the possibility of conviction. The defendant is not a vehicle to be recklessly driven by an overzealous prosecutor down the road to prison.

It is true that all evidence is prejudicial to one side or the other. However, highly inflammatory material, heroin, physically introduced out of its normal turn calculated to and did in fact, effect a dramatic finish must therefor be rejected as most ruinous to the already diminishing rights of the defendant.

After May Moy had been acquitted, it was incumbent upon the prosecutor to forthwith move for the reopening of his case in chief. His failure so to do, regardless of the nobility of his purpose, barred him from subsequently ap-

plying for that relief. His inadvertence does not relieve him of the responsibility of the subsequent prejudice to the petitioner's rights. To allow any prosecutor to reopen his direct case after all sides had presented their proofs, particularly in a narcotics case, is an invitation to disaster.

This Court enunciated, in general terms, the order of trial in a criminal prosecution. In *Goldsby* v. *United States*, 160 U. S. 70, 74, it was stated:

> "The government called a witness in rebuttal, who was examined as to the presence of the defendant at a particular place, at a particular time, to rebut the testimony which had been offered by the defendant to prove the alibi upon which he relied. The testimony was objected to on the ground that the proof was not proper rebuttal. The court ruled that it was and allowed the witness to testify. It was obviously rebuttal testimony, however, if it should have been more properly introduced in the opening, it was purely within the sound discretion of the trial court to allow it, which discretion, in the absence of gross abuse is not reviewable here."

The phrase "gross abuse" was defined in *United States* v. *Hirsch*, 74 F. 2d 215 (2nd Cir.), where it was held that it would be a gross abuse if evidence, appropriate for the direct case, was introduced in rebuttal and was calculated to supply a dramatic finish or any other effect prejudicial to the rights of the defendant.

The Government, within the framework of this case, a narcotics prosecution, succeeded, by inadvertence or otherwise, in supplying the dramatic climax to an otherwise weak case. May Moy had been acquitted at the close of the prosecution. Sheck Hom had obtained his freedom by jury verdict. The petitioner had in fact been held blame-

less of conspiracy. The prosecution's star witness, Tom Tung, had become trapped in his own contradictions. Something of a fiery and dramatic character was needed to give breath to this gasping prosecution. That something was a half kilogram of heroin. Its introduction during this phase of the trial upset the delicate balance of the litigation and severely injured the petitioner. This massive quantity of physical contraband prejudiced the jury, already conditioned against narcotics and alleged narcotics traffickers, by the oral evidence in the instant case.

One need not speculate that its admission caused the departure of all dispassionate considerations by the jury. The Government had supplied the stimulant. This stimulant operated to buttress the substantive count alleged against the petitioner. The half kilogram of heroin fed back and triggered the conviction of the petitioner under the first count of the indictment.

3. The lower Court was duty bound to comply with the request that Tom Tung submit to a mental examination to determine his capacity to testify competently. Its failure to grant the application was reversible error.

Tom Tung, in excess of sixty years of age and an admitted drug addict of long standing, a special employee of the Bureau of Narcotics, seducer of his nephew Sheck Hom, was the foundation of the Government's case. This dissolute man, at an age when senility, hastened by over 40 years' narcotic addiction is a possibility, was characterized by the official interpreter as a witness whose answers did not make sense. Tung, despite his apparent knowledge of both English and Chinese, did not comprehend the import of the questions propounded. As a result, counsel, late in the trial, moved for a mental examination of the witness.

This application was denied. However, the Trial Court stated that counsel had had an opportunity to interrogate the witness prior to trial and should have made his application at a more timely moment. Counsel then informed the Court that it was impossible to determine Tung's mental capacity as he, a special employee, had been most hostile to counsel on the prior occasion. He had attributed this attitude to Tung's status as a special employee.

It is the rule that the mental capacity of a witness is for the Court and not the jury. *Henderson* v. *United States*, 218 F. 2d 14, 17 (6th Cir.).

See also:

Stephan v. *United States*, 133 F. 2d 87 (6th Cir.), cert. denied, 318 U. S. 781; rehearing denied, 319 U. S. 783;

United States v. *Tannuzzo*, 174 F. 2d 177 (2nd Cir.), cert. denied, 338 U. S. 815.

In *Henderson* (*supra*), it was suggested that the better practice is for the Court to either question the witness himself or be present at his examination. No such procedure was followed here. The trial court made tacit reference to the appropriate rule of law. It, however, preferred to ground its ruling on counsel's failure to make timely application after interviewing a hostile witness. The ruling rests on a concept not sanctioned in law and hence was erroneous. This error, of a substantial nature, prejudiced the petitioner and deprived him of a fair trial.

CONCLUSION

The petition for certiorari should be granted and this court, in the exercise of its powers, should order that the judgment of conviction be reversed and the indictment dismissed or a new trial ordered.

March, 1960.

Respectfully submitted,

GILBERT S. ROSENTHAL

and

AARON J. JAFFE,

Attorneys for Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 162—October Term, 1959

(Argued November 30, 1959 Decided February 17, 1960)

Docket No. 25836

UNITED STATES OF AMERICA,

Appellee,

v.

LEE WAN NAM, a/k/a HONG LEE,

Appellant.

Before: CLARK, WATERMAN and MOORE,

Circuit Judges.

After a jury trial in the United States District Court for the Southern District of New York, Weinfeld, *J.*, appellant was convicted of having violated 21 U. S. C. §§ 173, 174. Affirmed.

S. HAZARD GILLESPIE, JR., U. S. Attorney, Southern District of New York (Robert Price, George I. Gordon, Asst. U. S. Attorneys, of counsel), New York City, *for Appellee.*

GILBERT S. ROSENTHAL (Aaron J. Jaffe, of counsel), New York City, *for Appellant.*

WATERMAN, *Circuit Judge*:

Appellant, together with co-defendants May Moy and Sheck Hom, was tried before Judge Weinfeld and a jury on a three count indictment alleging violation of 21 U. S. C. §§173, 174, and a conspiracy to violate these sections. The first count charged appellant and Sheck Hom with trafficking in eleven grains of heroin; the second count charged May Moy with trafficking in one-half kilo of heroin; and the third count charged a conspiracy among the three defendants to traffic in the drugs. Defendant May Moy was acquitted upon motion at the close of the Government's case. Defendant Sheck Hom was acquitted by the jury. Appellant though acquitted by the jury on the conspiracy count was convicted of the substantive crime.

Appellant first claims error because of the denial of his application, made near the end of trial, that a Government witness, Tom Tung, be subjected to a mental examination to determine capacity to testify. Judge Weinfeld denied the application, stating that the application had not been timely made and that no basis for it had been afforded by Tung's testimony. The issue of a witness's competency to testify and the related issue of whether to order a mental examination to assist in determining competency are both matters peculiarly within the discretion of the trial court. We find no abuse of discretion here. See *United States* v. *Tammuzzo*, 174 F. 2d 177, 181 (2 Cir. 1949), *cert. denied*, 338 U. S. 815, *rehearing denied*, 338 U. S. 896; *Carrado* v. *United States*, 210 F. 2d 712, 721 (D. C. Cir. 1953), *cert. denied*, 350 U. S. 938; *Henderson* v. *United States*, 218 F. 2d 14, 17-18 (6 Cir. 1955), *cert. denied*, 349 U. S. 920, *rehearing denied*, 349 U. S. 969.

Second, appellant objects to the admission of a package containing one-half kilo of heroin seized in the apartment of May Moy. Insofar as the objection relates only to the

fact that the heroin was introduced during the Government's rebuttal, we find the objection unpersuasive. For reasons to be indicated subsequently in this opinion, the heroin was inadmissible as long as May Moy remained a co-defendant. As a matter of timing if the Government had requested leave to reopen its case, the heroin could have been introduced immediately after the court granted May Moy's motion for acquittal and before the remaining defendants began presentation of their defenses. Judge Weinfeld, accepting the statement of Government counsel that the evidence would have been then introduced but for inadvertence, ruled that no prejudice would result from introduction during rebuttal. These trial situations must be dealt with in each case as they occur in the posture of that particular case, and we find no abuse of discretion here. See *Goldsby* v. *United States*, 160 U. S. 70, 74 (1895); *United States* v. *Lieblich*, 246 F. 2d 890, 895 (2 Cir. 1957), *cert. denied*, 355 U. S. 896; *Duke* v. *United States*, 255 F. 2d 721, 729 (9 Cir. 1958), *cert. denied*, 357 U. S. 920; *United States* v. *Montgomery*, 126 F. 2d 151, 153 (3 Cir. 1942), *cert. denied*, 316 U. S. 681.

Appellant presents a more difficult question by maintaining that inasmuch as the heroin was illegally seized it was not only inadmissible against May Moy but also against the two remaining defendants. At a previous and abortive trial of this same case, Judge Palmieri held that, under the doctrine of *Miller* v. *United States*, 357 U. S. 301 (1958), the heroin had been obtained from May Moy's apartment by an illegal search and seizure. Judge Weinfeld reached the same conclusion and ordered the heroin suppressed while May Moy was a co-defendant standing trial. It is appellant's contention that evidence once suppressed and held inadmissible during a trial cannot be subsequently introduced in the same trial even though the victim of the illegal search and seizure has been dismissed as a defendant.

In *Goldstein* v. *United States*, 316 U. S. 114, 121 (1942) the Supreme Court surveyed the cases and stated, "While this court has never been called upon to decide the point, the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized." The victim of an illegal search and seizure has been consistently defined as one who either has a right to possession of the premises searched or has a possessory interest in the property seized. *United States* v. *Pepe*, 247 F. 2d 838, 841 (2 Cir. 1957). See also *Elkins* v. *United States*, 266 F. 2d 588, 595 (9 Cir. 1959); *Gaskins* v. *United States*, 218 F. 2d 47 (D. C. Cir. 1955); *Gibson* v. *United States*, 149 F. 2d 381, 384 (D. C. Cir. 1945), *cert. denied, sub nom. O'Kelly* v. *United States*, 326 U. S. 724. In the present case the one-half kilo of heroin was not introduced until after May Moy had been acquitted. Neither of the remaining defendants, Sheck Hom or appellant, asserted a possessory interest in the heroin or a possessory right in the premises searched. Therefore, we hold that appellant lacked standing to object to admission of the heroin.

Appellant contends that *McDonald* v. *United States*, 335 U. S. 451 (1948), requires departure in the present case from the rule in the lower federal courts that to demand suppression of evidence illegally seized a defendant must possess the requisite "standing". In *McDonald*, defendants McDonald and Washington were convicted of having operated a "numbers game". Defendants had been arrested in McDonald's apartment and certain papers and adding machines were seized at that time and were admitted later as evidence at the trial although McDonald had moved for their suppression and return. The Supreme Court reversed both convictions holding that the evidence seized should have been suppressed. With reference to defendant Washington's conviction, the Court stated (at p. 456):

> *"It follows from what we have said that McDonald's motion for suppression of the evidence and the return of the property to him should have been granted* * * * It was, however, denied and the unlawfully seized evidence was used not only against McDonald but against Washington as well, the two being tried jointly. Apart from this evidence there seems to have been little or none against Washington. Even though we assume, without deciding, that Washington, who was a guest of McDonald, had no right of privacy that was broken when the officers searched McDonald's room without a warrant, we think that the denial of McDonald's motion was error that was prejudicial to Washington as well * * * *If the property had been returned to McDonald, it would not have been available for use at the trial.* We can only speculate as to whether other evidence which might have been used against Washington would have been equally probative." (Italics supplied.)

The Court's decision as to Washington's conviction hinged upon the fact that the trial court committed error in failing to return the evidence to McDonald. Here the property illegally seized was heroin; and, as contraband, it could not be returned despite the illegal seizure. *United States* v. *Jeffers*, 342 U. S. 48, 54 (1951); *Trupiano* v. *United States*, 334 U. S. 699, 710 (1948). *McDonald* is entirely consistent with the result we reach here.

Conviction affirmed.

APPENDIX B

AMENDMENT IV—UNITED STATES CONSTITUTION.

"The rights of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT V—UNITED STATES CONSTITUTION.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statutes Involved

Title 21, United States Code.

"§173. IMPORTATION OF NARCOTIC DRUGS PROHIBITED; EXCEPTIONS; CRUDE OPIUM FOR MANUFACTURE OF HEROIN; FORFEITURES.

It is unlawful to import or bring any narcotic drugs into the United States or any territory under

its control or jurisdiction; except that such amounts of crude opium or coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drugs imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug, be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision shall be placed in the custody of the board and in its discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes (Feb. 9, 1909, c. 100, §2, 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, §1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657."

"§174. SAME; PENALTY; EVIDENCE.

Whoever, fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned, not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

RULE 41 (E)—FEDERAL RULES OF CRIMINAL PROCEDURE.

(e) Motion for Return of Property and to Suppress Evidence.

"A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or

(2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

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No. 798

In the Supreme Court of the United States

OCTOBER TERM, 1959

LEE WAN NAM a/k/a/ HONG LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A; R. 76-80[1]) is reported at 274 F. 2d 863.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1960 (R. 81). The petition for a writ of certiorari was filed on March 17, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "R." designates the appendices to the briefs below, on file with the Clerk of this Court. The original trial transcript ("T.") is being filed herewith.

QUESTIONS PRESENTED

1. Whether petitioner, who was admittedly not the victim of the search of May Moy's apartment, nor convicted as a result of the heroin there seized, can complain of that search and seizure or of the admission of the narcotics seized from the apartment.

2. Whether the trial judge abused his discretion in not directing a mental examination of government witness Tom Tung.

STATEMENT

On February 27, 1958, a three count indictment was returned in the District Court for the Southern District of New York. Count one charged petitioner and Sheck Hom with a substantive narcotic offense involving approximately 11 grains of heroin, in violation of 21 U.S.C. 174 (R. 1, 4); count 2 charged May Moy with a substantive narcotic violation involving about 17 ounces, 337 grains of heroin (R. 5); and count 3 charged that petitioner, May Moy and Sheck Hom engaged in a narcotics conspiracy from about February 1, 1958, until the date of the return of the indictment (R. 4-6). During the course of the trial, a judgment of acquittal was granted as to May Moy with respect to the charge set forth in count 2, and she was dismissed as a co-conspirator in count 3 (R. 2, 17-18, T. 608, 630-631).[2] The jury

[2] This judgment of acquittal stemmed from the trial court's grant, at the commencement of the trial, of May Moy's motion to suppress the 17 ounces 337 grains of heroin obtained upon a search of her apartment (R. 10).

acquitted Sheck Hom, and acquitted petitioner on count 3, but convicted him on count 1 (R. 68-69, T. 1184-1185). He was sentenced to 5 years imprisonment on that count (R. 7-8, T. 1201 A). The court of appeals unanimously affirmed his conviction. 274 F. 2d 863. The pertinent facts adduced by the government are these:

1. Pursuant to pre-arrangement, on the night of February 5, 1958, petitioner and Sheck Hom met with government narcotic agent Milton Wu in an automobile at Mulberry and Bayard Streets, New York (T. 68-69). Agent Wu, who was introduced as a narcotics purchaser, told petitioner that he wanted to buy half a kilo of heroin. Petitioner said he could obtain it for him for $6,600 (T. 70). Wu then requested that he be shown a sample of the heroin and that if the quality proved satisfactory he would pay the purchase price in advance (T. 70-71). Petitioner left the automobile, and while under surveillance by other narcotic agents was seen to meet with May Moy (T. 76, 232-235, 298-300). After their meeting in the recess of a store front, petitioner left and returned to Mott and Bayard Streets (T. 304-306). This was approximately 12:30 a.m. (T. 77-78). He entered the automobile and handed Wu a small cellophane wrapped package which he said was the sample (T. 78). Wu left the car, field tested the contents, and found that they contained narcotics (T. 80). He then returned and placed petitioner and Sheck Hom under arrest (T. 81). Subsequent analysis revealed that this sample contained a 68.9% heroin content

(T. 393-395). This transaction was the basis of the charge in count 1, and was alleged as one of the overt acts in the conspiracy count (R. 4, 6).

After her meeting with petitioner, May Moy was followed by federal narcotic agents, and seen to enter the premises at 87 Clinton Street, New York (T. 234-235, 301). Following petitioner's arrest by Agent Wu, he was brought to the outside of that building and there told the agents in which apartment May Moy resided (T. 239-240). Agents Ward and Fitzgerald entered the apartment, arrested May Moy, and seized some 17 ounces, 337 grains of heroin (T. 871-872).

2. The evidence of narcotics found in May Moy's apartment was suppressed as to her.[3] After the order of suppression, the government in its case in chief sought to introduce the seized heroin limited to petitioner. The court excluded it on the ground that, since May Moy was still in the case, admission of the narcotics would be "highly prejudicial to her" (R. 73, T. 264-269). At the close of the government's case, May Moy was acquitted by the court (R. 73, T. 608, 630-631). Subsequently, after the close of the defendants' case, the court permitted the intro-

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[3] At the first trial on this indictment in November 1958, Judge Palmieri excluded this seized contraband as to May Moy on the ground that the mode of entry was violative of the rule announced in *Miller* v. *United States*, 357 U.S. 301. Following the order of suppression, a mistrial was declared as to all the defendants because a government witness had volunteered a statement touching upon the material suppressed. Relying upon Judge Palmieri's ruling, Judge Weinfeld also ordered the seized heroin suppressed as to May Moy in the trial below (R. 9-10).

duction of the seized heroin, noting that government counsel had indicated to him that through inadvertence and the pressure of trial he had overlooked moving to reopen his direct case after May Moy's acquittal. The court's view was "that no prejudice can come to the defendants" by its admission at this time (R. 74, T. 864).

ARGUMENT

1. Petitioner argues that the heroin suppressed as to May Moy should also have been suppressed as to him, despite the fact that he was not the victim of the search and seizure (Pet. 5-11). But the heroin seized from May Moy's apartment was relevant only to the conspiracy count upon which the jury acquitted petitioner. Proof on count 1, the only count upon which he was convicted, consisted of direct evidence that he transferred contraband heroin to narcotic agent Wu (see the Statement, *supra*, pp 3-4).

In any event, petitioner's claim is fully answered by this Court's recent decision in *Jones* v. *United States*, 362 U.S. 257. While the Court did liberalize the "standing" rule by holding that the narrow technical concepts of property law should not "be determinative in fashioning procedures ultimately referable to constitutional safeguards" (362 U.S. at 266), it did not discredit, but rather reaffirmed, the basic doctrine that only one aggrieved by a search and seizure has a right to complain of it. See 362 U.S. at 260-1.

Petitioner does not assert, nor does the record indicate, that he was a victim of a search and seizure,

under the *Jones* standard. He claims no interest in the narcotics seized nor in the premises searched, and he was not on the premises when the search occurred. In actuality, petitioner is simply "'one who claims prejudice only through the use of evidence gathered as a consequence of a search [and] seizure directed at someone else", and as such has no standing to complain. *Jones*, 362 U.S. at 261.[4]

Nor is this the kind of illicit-possession narcotics case in which the assertion by the defendant of a possessory interest would have been to admit guilt of the crime charged. Petitioner was not convicted as a result of a presumption arising from his connection with the seized heroin. On the contrary, he was convicted on direct evidence showing a violation of 21 U.S.C. 174, occurring prior to the time of the seizure and involving different heroin.[5]

---

[4] Petitioner's reliance upon *McDonald* v. *United States*, 335 U.S. 451, is misplaced. In that case McDonald and Washington had been arrested in McDonald's apartment, and certain papers and adding machines were seized. Finding that these items, belonging to McDonald, had been unlawfully seized and that if, as they should have been, they had been returned to him they would not have been available against Washington at trial, the Court reversed the conviction of both defendants (335 U.S. at 456).

In this case, the subject of the seizure was contraband which was not returnable to May Moy despite the illegality of the search and seizure. Second, unlike Washington who was actually present on the premises when the search and seizure occurred and thus would have met the standing test adopted in *Jones*, petitioner was not present at May Moy's apartment when the seizure took place, and, as we have shown, has no standing at all.

[5] Similarly without merit is the order-of-proof argument (Pet. 12-14). As the trial court observed, the only reason

2. Petitioner also contends that the trial court abused its discretion in refusing to order a mental examination of government witness Tom Tung (Pet. 14-15). In denying the request, the trial court pointed out that the defense had an opportunity to apply for a mental examination after an interview with the witness the previous June and had failed to do so. He then stated (R. 19-20, T. 984-985):

> * * * I hold that this application, coming at the tail end of the trial, when the Government is in its rebuttal case, is made entirely late, and further, that there is no warrant for it.
>
> * * * *
>
> * * * As far as I have been able to observe * * * it seemed to me he has been able to comprehend and answer every question that was put to him. Some questions may not have been immediately responsive, but some of this is probably due to language difficulty. * * *
>
> In my observation, I see no justification for the request, and accordingly, it is denied.

As the court below observed, whether or not to order a mental examination of a witness is a matter "pe-

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that the government introduced the seized contraband on rebuttal, and not by reopening its direct case after May Moy's acquittal, was because of inadvertence. The court properly ruled that no prejudice would result from such introduction during rebuttal. (R. 73-74; T. 863-865). The court of appeals correctly held that resolution of the order of proof is precisely the kind of issue within the discretion of the trial judge (Pet. 19). See *United States* v. *Tannuzzo*, 174 F. 2d 177, 181 (C.A. 2), certiorari denied, 338 U.S. 815; *Carrado* v. *United States*, 210 F. 2d 712, 721 (C.A. D.C.), certiorari denied, 350 U.S. 938.

culiarly within the discretion of the trial court." It held that on the facts of this case such discretion was not abused (Pet. 18). There is no occasion for this Court to review that finding.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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